IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHRISTOS G. PANAS, JR., individually,	)	**No. 23632-3-III**
Appellant,	)	
v.	)	**Division Three**
GERALD W. CULLEN and CAROLE A. CULLEN, husband and wife,	)	
Respondents and Cross-Appellants.	)	**UNPUBLISHED OPINION**

SWEENEY, C.J.—This is a boundary dispute between residential neighbors. The appellant, Christos G. Panas, Jr., assigns error to the trial court's refusal to award him title to a wedge of property between his lot and his neighbors Gerald and Carole Cullen's lot. We agree with the trial court. Mr. Panas's showing is not sufficient to support a claim of title to that property by adverse possession. And we affirm the court's summary dismissal of Mr. Panas's claim of adverse possession.

FACTS

Gerald W. and Carole A. Cullen bought Lot 28 on East Glencrest, in Spokane, Washington, in 1998. Christos G. Panas, Jr., bought the neighboring lot, Lot 27, in 2001. In 2004, Mr. Panas sued to quiet title to a wedge of land between the two lots.

The Cullens' predecessors in interest installed sprinklers, a partial fence, and a rock wall between the properties in 1983. The Cullens erected a fence around their backyard pool in 2000. The fence did not coincide with the plat line. It was on Mr. Cullen's side of the line. This dispute is about a wedge of land running from front to back of the properties between the plat line and the Cullens' fence.

Mr. Panas claimed that he and his own predecessor in interest, George Langford, used all the property on his side of the Cullens' fence in a way that was open, notorious, hostile, and continuous for over 20 years. He asserts that Mr. Langford laid down a concrete driveway, a gravel driveway, and a parking area on the disputed property. He cites Mr. Langford's affidavit that he discussed the property line with four successive former owners of the Cullens' lot and no one objected to the status quo. Mr. Panas believes this established adverse possession for the statutory period.

Mr. Panas had cut down some trees in the disputed area, removed or damaged other trees and shrubs, and dumped rocks and dirt. So the Cullens counterclaimed for damages, alleging that Mr. Panas's predations on the property violated state law—RCW 4.24.630 and RCW 64.12.030.

The Cullens commissioned a professional survey in May 2004, a month after Mr. Panas filed his complaint. The record on appeal includes survey drawings that locate the original platted boundary line and the Cullens' fence line. The drawings do not show Mr. Panas's house, garage, or driveways.

Both sides moved for summary judgment.

The Cullens argued that the boundary was never marked in any way before they fenced their pool in 2000. They said that all of Mr. Langford's improvements were on Mr. Panas's side of the line established by the survey. The Cullens said Mr. Langford's gravel driveway approached their fence only after Mr. Panas recently extended it. Mr. Panas said the disputed property always included the gravel driveway. He cited this driveway and a drained parking area as evidence of his predecessor Langford's adverse possession. The Cullens conceded that Mr. Panas owned everything up to the edge of the original gravel driveway. But they insisted that this is the only part of the disputed territory that Mr. Langford used.

The court concluded that affidavits by Mr. Langford defeated all of Mr. Panas's claims and that Mr. Panas had come up with nothing substantive to refute them. The court concluded that Mr. Langford's subjective intent was irrelevant, because his use of the land, viewed objectively, did not establish possession. It granted the Cullens' motion for summary judgment.

In their counterclaim, the Cullens alleged that Mr. Panas cut down trees, stripped the bark off another, and dumped dirt and rocks in the disputed area. They asked the court to order Mr. Panas to restore the land to its former condition and to award damages and attorney fees.

The court ruled that RCW 4.24.630 (liability for damage to land or property) required a showing of intent, and the court could not find that Mr. Panas deliberately violated the law. Instead, the court awarded treble damages under RCW 64.12.030 (injury to or removing trees). The court did not mention attorney fees.

Both sides appeal.

DISCUSSION

Mr. Langford supplied several affidavits and declarations in response to requests from both Mr. Panas and the Cullens. Mr. Panas characterizes Mr. Langford's statements as inconsistent and, therefore, not a proper basis for summary resolution of these claims.

The Cullens respond that the disputed property is, by definition, confined to the wedge on the Cullen side of the original platted boundary line. And Mr. Panas cannot meet the 10-year requirement for adverse possession to that property because Mr. Langford did not exercise dominion over this area. Mr. Langford's driveways and parking were on his side of the plat line. Moreover, Mr. Langford discussed the property line issue with the Cullens and all of the previous owners of the Cullen property. Nobody

knew precisely where the plat line was. Nonetheless all agreed that any encroachment on either side would not affect the property title. And this, the Cullens assert, defeats any adverse possession claim. Finally, the Cullens contend that Mr. Langford's use was not exclusive. Only recently did Mr. Panas attempt to exclude the Cullens from the property.

Standard of Review

We will affirm an order of summary judgment if the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c); *DuVon v. Rockwell Int'l*, 116 Wn.2d 749, 753, 807 P.2d 876 (1991). We engage in the same inquiry as the trial court. We view the evidence in the light most favorable to the nonmoving party, here Mr. Panas, and we review de novo. CR 56(c); *Cole v. Laverty*, 112 Wn. App. 180, 184, 49 P.3d 924 (2002); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Laverty*, 112 Wn. App. at 184.

Adverse Possession

Ownership by adverse possession requires actual use that is open and notorious, uninterrupted, hostile, and adverse to the owner for at least 10 years. RCW 4.16.020; *Laverty*, 112 Wn. App. at 184; *Chaplin v. Sanders*, 100 Wn.2d 853, 857, 676 P.2d 431

(1984). To prevail on summary judgment, then, the Cullens must show that the facts alleged in Mr. Panas's complaint and affidavits fail to establish one or more of these elements. To defeat summary judgment, Mr. Panas must produce more than speculation and argumentative assertions that unresolved factual issues remain. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). He must establish specific facts sufficient to show there is a genuine issue for trial. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997); *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Mr. Panas apparently is disputing on appeal the location of the real estate that was before the trial court. But the only evidence in this record establishing the disputed area is a couple of illustrations from the survey showing the true plat line and the Cullen fence. Mr. Panas now asserts that the professional survey plat line actually passes through his parking area and driveway, coming as close as five feet from his house. Reply Br. at 4. Nothing in the record supports this, however. The survey makes no reference to the driveway or the house. It shows only the Cullen fence.

The "disputed area" referred to throughout the proceedings below can only be the wedge between the platted boundary line and the Cullens' fence. There can be no dispute over Mr. Panas's possession of property he already has legal title to on his own side of the boundary. And Mr. Panas is not claiming any Cullen property beyond the fence. The

location of the survey line relative to the driveways and parking area is not a triable question of fact—it does not require weighing the evidence or evaluating the credibility of the parties. Either the survey line runs through the driveway or it does not.

Mr. Panas claims title to a driveway, a parking area, and drainage established by Mr. Langford. But the Cullens produced their own affidavits and additional declarations by Mr. Langford. They establish that no part of Mr. Langford's driveway, drainage, or other improvements lies in the wedge between the platted property line and the Cullens' fence. Clerk's Papers (CP) at 68, 71, 188, 231, 245. This shifted the burden to Mr. Panas to produce more than his own unsupported assertions that the Langford improvements were within the disputed wedge of property—i.e., that Mr. Langford's gravel driveway was on the Cullens' side of the survey line. It was up to Mr. Panas to produce a survey locating the original boundary on the Cullens' side of landscaping features he contends establish his claim. Mr. Panas did not do this.

Moreover, the Cullens are correct that Mr. Langford's use was permissive, not hostile, even if it did encroach over the true boundary. Owners of neighboring properties may agree that they do not know where the boundary is and that they do not wish to bother with a survey. Possession by one neighbor of a strip of the other's property is permissive, not adverse or hostile, if both agree to observe a mutually acceptable approximation of the boundary to be corrected at some future date when the true

boundary is determined. 17 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Property Law § 8.12, at 526-27 (2d ed. 2004) (citing *Beck v. Loveland*, 37 Wn.2d 249, 222 P.2d 1066 (1950), *overruled on other grounds by Chaplin*, 100 Wn.2d at 861; *Lindberg v. Davis*, 164 Wash. 680, 4 P.2d 501 (1931); *Davis v. Kenney*, 131 Wash. 168, 229 P. 311 (1924)).

That is what happened here. Mr. Panas concedes that Mr. Langford discussed the ambiguous property line with four successive owners of Lot 28 before the Cullens. And they all agreed to live with an approximate boundary for the time being. CP at 73, 139. Mr. Panas argues here and in his trial memorandum that these discussions are evidence of adverse possession. They are not. What they show is that any use by Mr. Langford along the boundary was permissive from the outset. And that Mr. Langford renewed the permissive basis with each successive neighbor. CP at 139.

Mr. Langford established possession, adverse or otherwise, to the area occupied by his original graveled driveway. Beyond that, Lot 27 and Lot 28 are legally divided by the platted boundary line between them. None of Mr. Panas's activities since acquiring title to Lot 27 rises to the level of adverse possession.

Cross Appeal

Damages for Waste

RCW 4.24.630 provides for damages for wrongful waste or injury to land. It

defines "wrongful" as acting intentionally and unreasonably while knowing the acts to be unauthorized. RCW 4.24.630(1). It does not apply, however, if the court awards damages under RCW 64.12.030, the timber trespass statute. RCW 4.24.630(2).

The trial court here (a) found no knowledge or intent and (b) awarded damages under RCW 64.12.030. RCW 4.24.630 does not, therefore, apply.

The Cullens contend that they did not have to prove the "wrongful" element to recover under RCW 4.24.630: it applies to entering the land of another and *either* removing trees *or* wrongfully causing waste or damage. The Cullens also maintain that they showed the wrongful waste element by Mr. Panas's dumping of debris.

Mr. Panas repeats his contention that the disputed area is undefined. He also contends there was no evidence that any trees he cut down were in the disputed area. Therefore, he insists, the court should not have awarded damages under either statute. Mr. Panas contends the remedy for unintentional timber trespass is single damages.

The standard of review remains de novo. *See, e.g.*, *Hill v. Cox*, 110 Wn. App. 394, 402, 41 P.3d 495 (2002).

The same facts can be construed as timber trespass under both RCW 4.24.630 and RCW 64.12.030. *See, e.g.*, *Holly Mountain Resources, Ltd. v. Westport Ins. Corp.,* 130 Wn. App. 635, 641, 104 P.3d 725 (2005).

In their counterclaim, the Cullens asked for relief under either RCW 4.24.630 or

RCW 64.12.030. By the plain language of RCW 4.24.630(2), the court had to pick one. The court picked RCW 64.12.030. The Cullens cannot now complain that the court granted the relief they sought.

The Cullens had the burden on their counterclaim. The court properly ordered Mr. Panas to remove debris and restore non-timber damage and to pay triple timber trespass damages and no fees.

Motion to Reconsider

The Cullens contend that Mr. Panas included improper material in his trial court motion to reconsider. Mr. Panas included new affidavits by Mr. Langford. These affidavits appear in the Clerk's Papers. The Cullens ask us to disregard them. Mr. Panas concedes the material was not timely filed but contends the interests of justice permit or require this court to consider it. He argues RAP 9.11, the rule whereby this court may direct the taking of additional evidence.

RAP 9.11 does not apply. The record here does not suggest that the trial court considered extraneous material submitted with the order on reconsideration. We will disregard it.

Motion to Dismiss

The clerk of our court forwarded to the panel a motion by the Cullens to dismiss Mr. Panas's appeal. We deny the motion.

Mr. Panas filed for chapter 7 bankruptcy protection after filing this appeal. He listed the judgment in favor of the Cullens on the timber trespass claim in his bankruptcy petition. He did not indicate on the form that this debt was disputed. The trespass judgment was discharged under 11 U.S.C. § 727 on September 8, 2005.

The Cullens contend the discharge in bankruptcy is a final order on the merits of the boundary dispute also (otherwise, Mr. Panas would have indicated on the bankruptcy form that the judgment was disputed). They argue, therefore, that the entire appeal should be dismissed.

The Cullens also contend that they invited Mr. Panas to stipulate to dismissing his appeal, but Mr. Panas refused. Therefore, the appeal is frivolous and the Cullens should receive fees.

Mr. Panas responds that he appealed the dismissal of his quiet title action. The timber trespass damages claim was a counterclaim by the Cullens. The superior court granted the claim but did not hold a hearing on damages and never entered a money judgment. The appeal in the boundary dispute, then, survives the bankruptcy.

Mr. Panas is correct that a claim must give rise to the right to payment to be discharged under the bankruptcy rules. 11 U.S.C. § 101(5)(B). Here, the court dismissed Mr. Panas's quiet title action by granting summary judgment dismissal to the Cullens. This action did not give rise to the right to payment and was not, therefore, a "claim"

under the bankruptcy code. *Id.* (a claim means the right to payment).

HOLDING

We affirm the order granting summary judgment to the Cullens on Mr. Panas's adverse possession claim and granting the Cullens' counterclaim for damages. We deny the Cullens' motion to dismiss the appeal.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, C.J.

WE CONCUR:

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Brown, J.

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Kulik, J.